

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TERRON NIXON,

Defendant-Appellant.

UNPUBLISHED

June 27, 2006

No. 261840

Wayne Circuit Court

LC No. 04-012255-02

Before: Fort Hood, P.J., and Cavanagh and Servitto, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of possession with intent to deliver less than 50 grams of cocaine, MCL 333.7401(2)(a)(iv), felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced, as a fourth habitual offender, to concurrent terms of 40 months to 35 years' imprisonment for the possession with intent to deliver less than 50 grams of cocaine conviction, and 1 to 15 years' imprisonment for the felon in possession of a firearm conviction. The above were to be served consecutive to the two years' imprisonment defendant was sentenced to serve for the felony-firearm conviction. Because sufficient evidence was presented to support defendant's convictions and because defendant was not denied the effective assistance of counsel, we affirm.

Defendant first argues on appeal that there is insufficient evidence to support his convictions. We disagree. Due process requires the evidence to show guilt beyond a reasonable doubt to sustain a conviction. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). In determining the sufficiency of the evidence, we review the evidence in the light most favorable to the prosecution. *People v Tombs*, 472 Mich 446, 459; 697 NW2d 494 (2005). We do not consider whether any evidence existed that could support a conviction, but rather, must determine whether a rational trier of fact could find that the evidence proved the essential elements of the crime beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 513-514; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992), citing *People v Hampton*, 407 Mich 354, 366; 285 NW2d 284 (1979).

The elements of possession with intent to deliver less than 50 grams of cocaine require the prosecution to show: "(1) that the recovered substance is cocaine, (2) that the cocaine is in a mixture weighing less than 50 grams, (3) that defendant was not authorized to possess the substance, and (4) that defendant knowingly possessed the cocaine with the intent to deliver."

MCL 333.7401(2)(a)(iv); *Wolfe, supra* at 516-517. A person need not have physical possession of a controlled substance to be found guilty of possessing it. *People v Fetterley*, 229 Mich App 511, 515; 583 NW2d 199 (1998). Possession may be either actual or constructive and may be joint as well as exclusive. *Wolfe, supra*, at 519-520.

To determine constructive possession, the totality of the circumstances must indicate a sufficient nexus between the defendant and the substance. *Id.* at 521. Specifically, constructive possession may be found where a defendant “knowingly has the power and intention to exercise dominion or control over a substance, either directly or through another person, or if there is proximity to the substance together with indicia of control.” *People v Sammons*, 191 Mich App 351, 371; 478 NW2d 901 (1991). Dominion and control in this respect mean the person has the right to possess the narcotics. *People v Konrad*, 449 Mich 263, 271; 536 NW2d 517 (1995).

The elements of felon in possession of a firearm require the prosecution to show that (1) defendant possessed a firearm, (2) defendant had been convicted of a prior felony, and (3) less than five years had elapsed since defendant had been discharged from probation. MCL 750.224f; *People v Tice*, 220 Mich App 47, 50-54; 558 NW2d 245 (1996). The elements of felony-firearm require the prosecution to show that defendant possessed a firearm during the commission or attempted commission of a felony. MCL 750.227b; *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999).

As with controlled substances, possession of a firearm may be actual or constructive and may be proven by circumstantial evidence. *People v Burgenmeyer*, 461 Mich 431, 437; 606 NW2d 645 (2000). A person has constructive possession of a firearm when the person has knowledge of the firearm’s location and the firearm is reasonably accessible to the person. *Id.* Possession of both a firearm and narcotics may be established by direct or circumstantial evidence and reasonable inferences arising from the evidence. *Id.*; *People v Hunter*, 466 Mich 1, 7; 643 NW2d 218 (2002).

Viewing the evidence in the light most favorable to the prosecution, sufficient evidence exists to support defendant’s convictions. Detroit police officer David Salazar explained that he received information from a personal informant that cocaine contained in Ziploc bags was being sold inside the house located at 9011 Longacre in Detroit. Salazar testified that he surveyed the house within 24 hours of receiving the information and observed five individuals approach the house in a span of 25 minutes, each staying a short time and then leaving. Salazar then obtained a search warrant and briefed police officer William Harder of the situation. Shortly thereafter, Harder began pre-raid surveillance of the house and observed defendant answer the front door, walk toward a Cadillac in the driveway, take an object from the trunk, and exchange it with an individual on the front porch for what appeared to be currency.

The search warrant was then executed and defendant, along with two other individuals, was found inside the house. Harder discovered three firearms, two of which were loaded, and a quantity of Ziploc bags containing crack cocaine (stipulated to have an aggregate weight of 32.62 grams) in the trunk of the Cadillac. Police officer Michael Carson also found numerous empty Ziploc bags and a digital scale – items commonly used in drug trafficking – on the living room table inside the house.

It is the jury's role to assess credibility, *Wolfe, supra* at 514-515, and, given the testimony concerning Salazar's and Harder's observations prior to the raid and Harder's and Carson's findings during the search, it is reasonable to infer that the jury found defendant had dominion and control over the 32.62 grams of cocaine found in the trunk of the Cadillac and that he intended to deliver it. Thus, the evidence sufficiently satisfies the elements of possession with intent to deliver less than 50 grams of cocaine.

The jury could likewise reasonably infer that defendant had knowledge and access to the firearms given that they were found next to the cocaine in the trunk of the Cadillac and could be construed as readily accessible to defendant. *Burgenmeyer, supra* at 437. In light of the fact that defendant had possession of the firearms during the commission of a felony and stipulated that he had been convicted of a prior felony and was ineligible to possess a firearm on June 7, 2003, the evidence is also sufficient to convict defendant of felony-firearm and felon in possession of a firearm.

Defendant next argues that defense counsel was ineffective because she failed to prepare for trial and had no trial strategy. We disagree. Claims of ineffective assistance of counsel involve a question of law, which this Court reviews de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Because this issue is unpreserved, this Court limits its review to mistakes apparent on the existing record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

The United States and Michigan Constitutions guarantee a defendant the right to effective assistance of counsel. US Const, Am VI; Const 1963, art 1, § 20. To establish ineffective assistance of counsel, "a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing professional norms and there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different." *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). It is presumed that defense counsel's decisions regarding what evidence to present or whether to call and question witnesses constitute trial strategy, which this Court will not review with the benefit of hindsight. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). Moreover, to establish a claim of ineffective assistance resulting from defense counsel's unpreparedness, a defendant must show prejudice resulting from the lack of preparation. *People v Caballero*, 184 Mich App 636, 640, 642; 459 NW2d 80 (1990).

At trial, after asking defendant his name and the location of his residence, defense counsel asked two questions to which the prosecution objected. After the trial court sustained both objections, defense counsel claimed she had no other questions for defendant. Later, outside of the jury's presence before closing arguments, defense counsel told the court that she "got nervous" earlier and wanted to have defendant testify again. However, after the jury returned, defense counsel elected to proceed with closing argument and did not recall defendant.

Despite this unorthodox behavior, defendant has failed to show that defense counsel's decisions at trial were the result of counsel being unprepared. In light of the fact that defense counsel's decision to question a witness is a matter of trial strategy, this Court cannot second guess that decision now that defendant has been convicted. *Dixon, supra* at 398. Indeed, the trial court noted its surprise that the prosecution did not cross-examine defendant and warned defense counsel that the decision to call defendant a second time would provide the prosecution

another opportunity to do so. In light of this, it was an objectively reasonable strategy for defense counsel not to expose defendant to the risk of cross-examination a second time. Moreover, given the evidence that was presented at trial implicating defendant in a drug sale, defense counsel decision to discontinue questioning defendant was not outcome determinative. *Id*

While defendant also argues that defense counsel's decision not to call other witnesses denied him effective assistance of counsel, this argument is without merit. A defense counsel's failure to call witnesses or present other evidence may amount to ineffective assistance of counsel only "if it deprives the defendant of a substantial defense." *Dixon, supra* at 398. "A defense is substantial if it might have made a difference in the outcome of the trial." *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), vacated in part on other grounds 453 Mich 902 (1996).

Here, defendant has failed to demonstrate how defense counsel's decision not to call other witnesses would have made a difference in the outcome of the trial. Defendant does not specify what defenses other witnesses could have established, but instead merely asserts that defense counsel's failure to call other witnesses prejudiced him. Moreover, the record is devoid of any indication that defense counsel's failure to call other witnesses would "have made a difference in the outcome of the trial." *Id*. Again, Harder testified that he observed defendant retrieve an item from the Cadillac and exchange it with another individual for currency combined with Harder's subsequent search of the Cadillac in which he discovered cocaine and firearms. Defendant has identified no witness or defense that would have refuted or conflicted with this testimony. As a result, defense counsel's decision not to call other witnesses did not deny defendant a substantial defense.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Mark J. Cavanagh
/s/ Deborah A. Servitto